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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 313

L. B. DINION, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS.

L. B. BINION, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 28, 1957.

OPINION OF THE COURT BELOW.

The opinion of the court below (Appendix A, infra, pp. 15) has not yet been reported.

JURISDICTION.

The judgment of the court below (Appendix B, infra, p. 16) was entered on June 28, 1957. The jurisdiction of this court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED.

The principal question is whether the sentence, though authorized by §145(b) is unlawful because it was not imposed under §3616(a) of the Code.

This court decided in *Achilli v. United States*, 353 U. S. 373, that §3616(a) did not apply to evasion of the income tax. Petitioner submits with deference that this is incorrect, and in view of the recentness of the *Achilli* decision, submits reasons that §3616(a) was not repealed by implication.[1]

STATUTES INVOLVED.

Internal Revenue Code of 1939:

§145. *Penalties.*

* * * * * * *

(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax:—

Any person required under this chapter to collect, account for, and pay over any tax imposed by this

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[1] In the event that certiorari is granted, petitioner reserves the right to argue that the overlap between §145(b) and 3616(a) precludes the imposition of a sentence under §145(b).

chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

(26 U. S. C., 1952 ed., Sec. 145 (b).)

Sec. 3616. Penalties.

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * * * *

STATEMENT.

On September 5, 1953, the petitioner pleaded guilty to two indictments charging that he did wilfully and knowingly attempt to defeat and evade income taxes due to the United States of America by filing and causing to be filed false and fraudulent income tax returns with the Collector of Internal Revenue at Dallas, Texas (R. 3, 6, 7, 97, 100-104).

On December 14, 1953, the petitioner was sentenced by the Court on the first count of Indictment No. 3766 to a term of imprisonment for a period of five years and to pay a fine in the sum of $5000.00, and under the second count of this indictment to a term of imprisonment for five years to run

concurrently with the first count and a fine in the sum of $5000.00 (R. 3, 93-94). The petitioner was sentenced on the fifth count of indictment No. 3767 to a term of imprisonment for a period of five years to run concurrently with that imposed on the first count of Indictment No. 3766 and to pay a fine in the sum of $5000.00, and on the sixth count of the indictment to pay a fine in the sum of $5000.00 and to a term of imprisonment for a period of five years, the execution of this sentence of imprisonment to be suspended provided that the fines totaling $20,000.00 be paid within 90 days. The Court dismissed the first, second, third and fourth counts of this indictment (R. 97, 136-140).

The petitioner has served a period of imprisonment from December 14, 1953, has paid the fines imposed, and has accrued credit for time served for good behavior while imprisoned in the United States Penitentiary at Leavenworth, Kansas (R. 145).

On September 22, 1956, a motion to correct the sentences was filed alleging that petitioner's sentences of imprisonment are excessive and illegal and that they exceed the maximum sentences of imprisonment authorized by law (R. 97, 143-145). Petitioner averred that his sentences of imprisonment should have been imposed for misdemeanors under §3616(a) of the Internal Revenue Code of 1939 rather than under §145(b) of the Internal Revenue Code (R. 144).

On September 28, 1956, the trial Court ordered that the motion of the petitioner to correct and set aside the sentences be denied (R. 146). On October 4, 1956, an appeal from this order to the Court of Appeals was taken.

On June 28, 1957, the Court of Appeals affirmed the judgment on the authority of *Achilli v. United States* and *Costello v. United States*.

REASONS FOR GRANTING THE WRIT.

This case presents, in its present posture, the sole question whether the recent decision of *Achilli v. United States* was, it is submitted, correctly decided. Petitioner submits, with deference, that it was not, and that great mischief will follow unless this decision is overruled.

1. For three successive Terms it was the Government's position that §3616(a) of the Internal Revenue Code of 1939 was applicable to income tax returns, and that there was accordingly an area of overlap between that section and §145(b) of the same Internal Revenue Code. See Br. Op. 7-11 in *Dillon v. United States*, No. 629, Oct. T. 1954, certiorari granted, 349 U. S. 914, and dismissed and remanded, 350 U. S. 906; U. S. Br. 10-11, 22-24, in *Berra v. United States*, No. 60, Oct. T. 1955, 351 U. S. 131; U. S. Memo., p. 2, in *Costello v. United States*, No. 666, Oct. T. 1956, while pending on the merits after grant of certiorari, 352 U. S. 988.

The government then executed a complete about-face and stated that §3616(a) was inapplicable to income tax returns. This court, in the *Achilli* case, declared:

> "And so, now, for the first time has the Government made a detailed survey of the problem of alleged overlapping between §3616(a) and §145(b)."

But this court should not take its law from the government, and it is submitted that the analysis supplied by the government to the Court and adopted by this court is not correct for the following reasons:

Section 3616(a) of the Internal Revenue Code of 1939 was derived from R. S. §3179. See Appendix A to IRC of 1939, "Derivation of Internal Revenue Code," 53 Stat. App. p. xxxii, s. v. §3616; Appendix B to id., "Statutes included in Internal Revenue Code," 53 Stat. App. p. xl, s. v. R. S. §3179. This derivation seems not to be in dispute.

In turn, R. S. §3179 was derived from Sec. 15 of the Act of June 30, 1864, 13 Stat. 223, 227. See side note to R. S. §3179 in the 1874 edition of the R. S., p. 614; id. in the 1878 edition, p. 611.

The Act of June 30, 1864, supra, imposed an income tax in its §§116-123, 13 Stat. at 281-285. Plainly, then, §15 of the 1864 Act applied to false or fraudulent income tax returns when first enacted. This, again, is not in dispute. From that premise it necessarily follows that §3616(a) still applies to the false or fraudulent income tax returns, for the reason that the meaning of a statute does not change simply because it passes through one or more revisions without changes in its substantive language. E. g., *Nye v. United States*, 313 U. S. 33; *Logan v. United States*, 144 U. S. 263, 302, and cases there cited.

§3179 of the Revised Statutes was never repealed, either expressly or by implication, but on the contrary was specifically re-enacted.

The Government admitted that the applicability of R. S. §3179 to income tax returns survived the repeal of the Civil War income tax and remained in force so as to govern returns filed pursuant to the income tax imposed by the Act of 1894. But it argued that in 1909 "Congress for the first time enacted a specific penal provision applicable to the income tax," and, since that latter provision involved the same penalties as R. S. §3179, that "in relation to the income tax the general provision of §3179 was superseded pro tanto by the specific provision in the 1909 act."

The fallacy of the foregoing argument lies in its premise, for as a matter of law the 1909 Act did not levy an income tax. In the period between the decision of this Court that held the 1894 income tax unconstitutional (*Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429, 158 U. S. 601), and the effective date of the Sixteenth Amendment, Congress could not and did not attempt to levy any income tax. Accordingly what was involved in the 1909 Act was an excise tax on corporation measured by income, and not an income tax. See *Flint v. Stone-Tracy Co.*, 220 U. S. 107, which sus-

tained the constitutionality of the corporate excise tax imposed by the 1909 Act. Moreover, the penalty provision of the 1909 Act (Sec. 38 (Eighth), 36 Stat. at 117) applied in terms only to the filing of a false or fraudulent return with intent to defeat or evade "the assessment required by this section to be made". It was not general legislation.

The first true income tax law subsequent to 1894 was the Act of Oct. 3, 1913, c. 16, 38 Stat. 114. The *penalty* provision thereof, §II(F), 38 Stat. at 171, with its maximum of a year's imprisonment and a $2000 fine, was greater than the penalty imposed by R. S. §3179. The mere increase in penalty was regarded by this court as impliedly repealing R. S. §3179. But the principle appropriately invoked is the rule that, where two penalties cover the same offense, the lesser necessarily governs. *Prince v. United States*, 352 U. S. 322; *Bell v. United States*, 349 U. S. 81, 83; *United States v. Universal C. I. T. Corp.*, 344 U. S. 218, 221-222; *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10. However, it is not necessary to resolve this question; since §11(F) by its terms was restricted to "the assessment required by this section to be made", it plainly cannot be construed to have effected a permanent repeal of R. S. §3179 with respect to the latter's applicability to all income tax returns in the future.

The penalty prescribed by §18 of the Revenue Act of 1916 (Act of Sept. 8, 1916, c. 463, 39 Stat. 756, 775; later expressly amended, in particulars not here material, by §1209 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 336) was the same as that set forth in §11(F) of the 1913 Act. Again, the 1916 penalty was limited to a false return affecting "the assessment required by this title to be made". The transitory aspect of the 1913 penalty provision was emphasized by its repeal, except in respect of taxes already accrued, by §24 of the 1916 Act (39 Stat. at 776). And other provisions of the 1916 Act negative any notion that Congress ever supposed that it was repealing or permanently amending R. S. §3179.

Sec. 16 of the 1916 Act, 39 Stat. at 773-775, expressly amended R. S. §§3167, 3172, 3173, and 3176. Plainly, then,

Congress was confronted with possible inconsistencies between the provisions of the Revised Statutes relating to internal revenue, and those of the new act, and took appropriate steps to weld all of them into a coherent and consistent body of law. The circumstances that, after amending the enumerated sections of the Revised Statutes, R. S. §3179 was left intact, unamended and unrepealed, *is surely eloquent evidence that Congress intended that latter provision to stand.*

We come now to the Revenue Act of 1917, which, according to the Court, is "further evidence that Congress withdrew the income tax from the reach of the general provisions of §3179". But, *on the contrary*, what the 1917 Act did was two-fold. First, it removed the inconsistency between R. S. §3179 and the particular income tax act with respect to the penalty for making a false return, by making the penalties under each identical; and, second, *it added the new offense of evading or attempting to evade the tax.*

It seems fairly clear, therefore, that Congress in the 1917 Act distinguished between the simple making of a false return, on the one hand, and the evasion or attempted evasion of the tax in any other manner, on the other.

Section 1004 of the 1917 Act distinguished between the two offenses of (a) filing a false, etc., return, and (b) attempting to evade the tax. The 1917 Act denounced both offenses in a single section and prescribed the identical penalty for each. The 1918 Act, on the other hand, denounced (b) in its §253, with a maximum fine of $10,000, and relegated the punishment of (a) to the provisions of R. S. §3179. This construction, which avoids both inconsistency as well as any discussion of implied repeal, is fortified by the circumstances that, in §1317 of the 1918 Act, 40 Stat. at 1146-1148, Congress expressly amended R. S. §§3164, 3165, 3167, 3172, 3173, and 3176. It neither amended nor repealed R. S. 3179, but on the contrary, made all existing administrative provisions of the internal revenue laws applicable to the income tax imposed by the 1918 Act. Sec. 1305, 40 Stat. at 1142.

It therefore necessarily follows that, with respect to punishing the simple filing of false returns, Congress intended to rely on R. S. §3179, and that it is the latter intention which explains the fact that from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns. And the reason for that omission is plain. The mere filing of false or fraudulent income tax returns did not need to be specifically prohibited in successive revenue acts, since such offenses were amply covered by the *permanent* provisions of R. S. §3179.

In 1939, Congress enacted the Internal Revenue Code, in order, as the title of the Act indicates, "To consolidate and codify the internal revenue laws of the United States."

And what did Congress do when confronted with that opportunity? It re-enacted R. S. §3179 as §3616(a) of the 1939 Internal Revenue Code, and it specifically provided in §61 of the Code that all administrative provisions should be applicable to income taxes.

Section 3616(a) was a part of Subchapter B, Determination of Tax Liability, which in turn was a part of Chapter 34, Information and Returns, which in its turn was a part of Subtitle D of the Code, entitled General Administrative Provisions. While, of course, Congress stated in §6 of the Act of Feb. 10, 1939 (53 Stat. 1a) that no inference of legislative construction should be drawn by reason of the location of any particular section, cf. *United States v. Dixon*, 347 U. S. 381, Section 61 of the Code would be meaningless if it were not possible to consider as administrative provisions sections which were not only so labeled, but which were plainly administrative in substance.

When it came to the Internal Revenue Act of 1954, 26 U. S. C. A., Congress re-enacted §3616(a) as §7207, eliminating the words "with intent to defeat or evade", which had caused the overlap with §145(b). The fact that Congress acted in 1954 to remove the overlap, proves conclusively that §3616(a) was never repealed before 1954.

2. Mr. Justice Frankfurter stated in *Achilli v. United States*:

> "We cannot hold that the classic method of evading the income tax, the filing of a false return, did not constitute an attempt 'in any manner to defeat or evade' that tax."

It is submitted that filing is not the classic method of evading the income tax, but merely the classic method of *charging* an evasion of income tax, and that there has always been a distinction made by Congress between "filing" and "attempting".

In *Spies v. United States*, 317 U. S. 492, it was squarely held that the difference between the misdemeanor denounced by §145(a), of wilfully failing to pay taxes due, and the felony of wilfully attempting to evade and defeat the tax, made criminal by §145(b), was that in the latter situation there must be proof of a wilful affirmative act. Mr. Justice Jackson, speaking for a unanimous Court, said (317 U. S. at 499):

> "By way of illustration, and not by way of limitation, we would think affirmative wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices of documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

Petitioner's conviction of the felony in that case was reversed because of the failure there of the trial judge properly to instruct the jury as to the difference between Sections 145(a) and 145(b).

The distinction defined in the *Spies* case was reaffirmed in another decision at the same Term, *United States v. Johnson*, 319 U. S. 503, where it was again pointed out that the filing of a false return might only be a misdemeanor. Mr. Justice Frankfurter, for the Court, said (319 U. S. at 514-515):

> "* * * the Circuit Court of Appeals read the substantive counts as though they charged Johnson *merely with the filing of false returns on March 15th. That may only be a misdemeanor* under §145(a) of the Internal Revenue Code, but that is not the offense with which Johnson was charged. He was charged with a felony made so by §145(b), the much more comprehensive violation of attempting 'in any manner to defeat and evade' the payment of an income tax. The false return filed on March 15th was only one aspect of what was a process of tax evasion." (Emphasis supplied.)

There, however, since the petitioner had conducted "an elaborately concealed illegal business" (319 U. S. at 517-518), the reversal of his conviction was in turn reversed.

If Congress had intended that mere filing a false income tax return be punished the same as attempting in any manner to defeat and evade the payment of an income tax, it surely would not have been necessary for this Court to catalogue the various methods by which a wilful attempt could be inferred. It is true that the various Courts of Appeals have indicated that mere filing of a return known to be false was regarded as an attempt, but the conviction in those cases did not merely rest alone upon the *allegation and proof of a wilful filing of a false return;* there was always proof of other affirmative acts in the record, *Kirsch v. United States*, 174 F. 2d 595 (C. A. 8).

In *United States v. Demos*, 291 Fed. 104 (S. D. Fla. 1923), the Court there expressed doubt whether Congress ever intended that the offense of evading and defeating an income tax established in an Internal Revenue Act should cover the

making of a false and fraudulent return, since that act was already punished under a prior statute.

At any rate, the cases are clear that filing a false and fraudulent return is not "the major kind of attempt", as stated by this Court. E. g., *Cave v. United States*, 159 F. 2d 464 (C. C. A. 8), certiorari denied, 331 U. S. 847 (defendant kept no books); *United States v. Lange*, 161 F. 2d 698 (C. C. A. 7) (elaborate system of payroll padding, fictitious purchases, suppressed sales, false invoices, altered records); *Locke v. United States*, 166 F. 2d 449 (C. C. A. 5), certiorari denied, 334 U. S. 837 (defendant "resorted to various ingenious and nefarious scheme and subterfuges"); *United States v. Chapman*, 168 F. 2d 997 (C. C. A. 7), certiorari denied, 335 U. S. 853 (defendant's mode of carrying on his business operations was calculated to conceal their magnitude and prevent investigation thereof); *Myres v. United States*, 174 F. 2d 329 (C. A. 8), certiorari denied, 338 U. S. 849 (defendant kept no books, records, cancelled checks or check stubs, and destroyed numerous files).

3. No reference is made in the *Achilli* opinion to *Berra v. United States*, 351 U. S. 131 (1956), where this Court assumed that filing a false and fraudulent tax return was a misdemeanor under §3616(a). Indeed, the Report of the Committee on Procedure in Fraud Cases of the American Bar Association in 1957 stated: "The Supreme Court held that although both sections applied to income taxes and could, in particular sections cover an identical offense, the choice between them was not a matter for the jury." We have, apparently, two conflicting decisions of this Court as to whether §3616(a) applies to income taxes.

The government, on page 15 of its brief, fn. 3, in the *Achilli* case, stated:

> "Since the Revenue Act of 1924, §145(b) has been the basis for prosecution in literally thousands of criminal income tax evasion cases, as appears, *infra*, pp. 32-33, its applicability to such cases has been sustained by

this Court and by the Courts of Appeals in a host of decisions extending over a period of three decades. A ruling now that the sentences involved in all these cases are illegal if they exceed the limits permitted by §3616(a) would create legal and practical difficulties of an obviously grave nature."

It is submitted that far greater legal and practical difficulties are created by the Court's decision in the *Achilli* case. The government has stated that they have invoked §3616(a) in 175 cases of alleged income tax evasion. It never did state how many cases of §145(b) *exceeded* the limits permitted by §3616(a), probably because there were less; and petitioner suggests that although it may have been the basis for prosecution in "literally thousands of income tax evasion cases", that at the present time there are more defendants who will be released as a result of this decision than if §3616(a) were held to apply to income tax cases where the charge is merely the filing of a false and fraudulent return. Furthermore, as a result of this Court's decision, taxpayers whose cases are of a minor nature, which the government had previously prosecuted under §3616(a) can now only be prosecuted under §145(b) and are liable to the maximum penalties under that statute.

4. The philosophy of repeal by implication is not favored, and surely has no place where the section sought to be repealed was itself enacted subsequent to the repealing section. Section 3616(a) obviously was enacted later than §145(b). Especially where the same subject matter has been covered by both a general and special statute, the terms of the latter always prevail. *Washington v. Miller*, 235 U. S. 422 (1914). Clearly the specific charge of filing a false return prevails over the general denunciation of attempting to evade taxes prescribed by §145(b), where the filing of a false return is only one of the "attempts in any manner", and then not as a matter of specific statutory pro-

hibition but by judicial interpretation. It is submitted that the death of §3616(a) under the circumstances of this case is "not within the judicial competence".

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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July, 1957.